ICCwatch ... monitoring the International Criminal Court's threat to civil liberties and national autonomy.

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INTERNATIONAL CRIMINAL COURT CONDUCTING A MODERN-DAY POLITICAL 'SHOW TRIAL' AGAINST THOMAS LUBANGA

The current trial of Thomas Lubanga Dyilo in The Hague is turning into the equivalent of a Twentieth Century style political 'Show Trial', *ICCwatch* claims. The dice have been loaded outrageously from the start against the defendant.

First, the ICC prosecutor, Luis Moreno-Ocampo, was revealed in July 2008 to have deliberately withheld evidence from Mr Lubanga's defence team which indicted his innocence. This information, described by the ICC's own Trial Chamber as 'exculpatory materials' - that is to say, evidence that cleared the defendant of wrong-doing - was kept from the defence in violation of article 54(1)(a) of the Rome Statute that established the ICC. This obliges the prosecutor to *'investigate incriminating and exonerating circumstances equally'*. The Trial Chamber ordered Lubanga's release and despite having seen the new evidence Mr Moreno-Ocampo appealed against the decision with the result that the defendant was kept in custody. This extraordinary episode highlights the ICC's disregard for the traditional principles underlying western, liberal jurisprudence.

The prosecuting team have enjoyed a massive advantage over the defence in terms of the financial resources available. Twenty researchers have been out in The Congo to try and uncover evidence against Thomas Lubanga whereas he has only been able to send out one person.

What should also be of alarm to those concerned with civil liberties is that the defendant will not ultimately be judged by a randomly selected jury but instead by judges drawn from the ranks of the ICC itself. There is a clear potential conflict of interest at work here. It is worth noting that ICC is not answerable for its conduct and procedures to any democratic legislature. It is literally a law unto itself.

***ICCwatch* also notes with dismay, that alleged victims have been accorded special rights in the trial.** (See ICC Press Release, 23 January 2009, http://www.icc-cpi.int/press/pressreleases/467.html.)

Following a decision made by the Trial Chamber on 18 January 2008, some 35 victims will appear in the Lubanga trial. They and their lawyers will

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effectively play the role of supplementary prosecutors, for instance by being allowed to see court documents and to make statements during the course of the trial. **Since they are not witnesses, the defence will not be able to cross-examine them.**

This decision to allow victims to “participate fully” in the trial (to use the words of the press release) is the culmination of a long and regrettable process in international tribunals. For years, the supporters of international tribunals have stressed their role as a platform from which victims can obtain redress for wrongs allegedly committed.

Yet whether wrongs have indeed been committed, and by whom, is precisely what a criminal trial is supposed to establish. To give victims statutory rights in a criminal trial is to put the cart before the horse. It is to assume that they are victims of acts committed by the defendant. It tips the balance of power yet further in favour of the prosecution and against the defence.

The situation is made only worse by the fact that all 35 so-called victims appear anonymously. The anonymity of victims, like the wide-ranging anonymity accorded to witnesses in international tribunals, severely compromises the public nature of the proceedings and weakens the ability of the defence to counter the accusations they make.

In most Western jurisdictions, victims have no special rights whatever. It is true that, in some jurisdictions, such as Germany, they can play a small role. But this is a recent development which is itself questionable. Generally speaking, the case for the prosecution is conducted exclusively by the prosecuting counsel acting on behalf of the state.

As one legal commentator has written;

> ***"As the defendant already is in a nearly hopeless position of inferiority due to the distribution of roles in the trial, it seems to me almost absurd to set up the victim as another opposing party … the victim should not be assigned the role of a party or even a quasi-party in the criminal trial*."** [1]

ICCwatch strongly urges that this biased model not be copied by international tribunals, which already accord far too much power to the prosecution and far too little to the defence.

International justice is being corroded by the injection into its deliberations of considerations about peace-building and reconciliation which have nothing to do with the neutral and strict operation of the criminal law.

To be sure, victims may be invited to play a role in some political procedures,

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especially if they aim at the settlement of a dispute, as was the case in the Truth and Reconciliation Committee in South Africa. But that body aimed precisely at reconciliation and not punishment by the criminal law, whereas the ICC, like any criminal tribunal, must examine the facts dispassionately and apply the law as it stands.

Victims should be radically excluded from criminal trials, which instead should call only witnesses who are prepared to give evidence in public and under oath, and to be subject to cross-examination.

For more information concerning *ICCwatch*'s critique of the International Criminal Court, please refer to www.iccwatch.org

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[1] Bernd SCHÜNEMANN, The Role of the Victim Within the Criminal Justice System: A Three-Tiered Concept, Buffalo Criminal Law Review (1999) 3:33

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